BRB No. 00-583

DONALD E. STRATTON, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEEDON ENGINEERING, COMPANY	)	DATE ISSUED: _____
	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
	)	
	)	DECISION and ORDER
Respondent	)	*EN BANC*

Appeal of the Decision and Order on Remand – Awarding Benefits, the Decision on Motion for Reconsideration, and the Supplemental Decision and Order Granting Attorney Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

Susan S. Erdelyi (Marks Gray, P.A.), Jacksonville, Florida, for employer-carrier.

Joshua T. Gillelan II and Laura Stomski (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, McGRANERY and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits, the Decision on Motion for Reconsideration, and the Supplemental Decision and Order Granting Attorney Fee (1993-LHC-1402) of Administrative Law Judge David W. Di Nardi rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). The Board heard oral argument in this case on September 12, 2000, in Savannah, Georgia.[1]

[1]Administrative Appeals Judge J. Davitt McAteer did not attend the oral argument but has reviewed the transcript, briefs and record.

Claimant worked as a marine mechanic for employer for 25 years.[2] On May 11, 1990, he injured his back while he and a co-worker were attempting to load a 200-pound valve onto a skiff to transport it to a ship. Tr.1 at 17-18.[3] He began conservative treatment with Dr. Tandron who diagnosed degenerative disc disease, disc space narrowing at L5-S1 and possible herniations at L2-3, L3-4. Cl. Ex. 1 at 4, 6, 10. Dr. Tandron released claimant to return to light duty work on October 11, 1990, with a five percent permanent impairment. *Id.* at 12. Claimant returned to his usual job but received assistance carrying heavy items and spent less time aboard ships and more time in the shop. Tr.1 at 19, 43; Tr.2 at 36. On January 4, 1991, claimant injured his back while "pickling" (using chemicals to clean and rust-proof) pipes at employer's "clean shed" next to its shop facility. Tr.1 at 21-22, 29; Tr.2 at 37, 39. Dr. Tandron diagnosed a re-strain of claimant's back, and the results of a follow-up MRI revealed degenerative changes at L2-3 and L4-5 with focal disc herniations at those levels. Cl. Ex. 1 at 15, 18. Dr. Tandron determined that claimant's condition reached maximum medical improvement on May 11, 1991, assessed a 20 percent permanent impairment, and established physical restrictions, essentially limiting claimant to sedentary work. *Id.* at 20-23, 25-26. Claimant has not worked since the 1991 injury, and he filed claims for benefits under both the state and the Longshore Acts.

In June 1993, claimant and employer entered into a settlement under state law for a lump sum payment of $50,000, less $8,250 for an attorney's fee, for the January 1991 injury. Emp. Ex. 4. This settlement was approved by a state compensation claims judge. Emp. Ex. 5. Claimant continued to pursue his claim for benefits under the Act for this injury.

Administrative Law Judge Clement J. Kichuk conducted a hearing on the claim. He acknowledged the parties' agreement that the May 1990 injury is covered under the Act and that employer paid all benefits as required by the Act. Decision and Order (Kichuk) at 3. He then determined that claimant did not meet the Section

---

[2]Employer is a service repair company which caters to the marine industry. Claimant repaired items such as boilers, controls, feed pumps, valves, thermometers and pressure gauges. He specialized in overhauling feed pumps which feed water into boilers. This work was performed both in engine rooms on ships and in employer's shop. Tr.1 at 15, 39; Tr.2 at 27-30, 97.

[3]There were two hearings in this case. Tr.1 refers to the transcript from the first hearing on October 6, 1993. Tr.2 refers to the transcript from the second hearing on August 2, 1999. All exhibit citations herein refer to exhibits submitted at the second hearing.

3(a), 33 U.S.C. §903(a), situs requirement for the injury in January 1991. He found that the injury occurred "a distance" from the water and that there was no evidence this area constituted an "adjoining area" as there was no evidence employer needed its facility to be within a certain proximity of navigable waters and because the facility did not abut navigable waters. *Id.* at 4. Moreover, he found that the parties clearly intended that jurisdiction rest with the state by virtue of their settlement. *Id.* at 5. Additionally, Judge Kichuk found that claimant sustained two separate injuries in 1990 and 1991, and that the second was not the natural progression of the first. Consequently, he denied benefits under the Act for the second injury because it did not occur on a covered situs. *Id.* at 6. Judge Kichuk's decision was administratively affirmed by the Board on September 12, 1996, in accordance with Public L. No. 104-134, 110 Stat. 132. Claimant appealed to the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit held that claimant is not barred from receiving benefits under the Act by virtue of the settlement with employer under state law and that the settlement does not constitute a settlement under the Act because it was not in compliance with the provisions of Section 8(i), 33 U.S.C. §908(i). *Stratton v. Weedon Engineering Co.*, No. 96-3520 (11th Cir. Sept. 10, 1998). The court vacated Judge Kichuk's decision, holding he failed to apply the appropriate law in addressing the situs issue. Rather than applying the controlling law of the United States Court of Appeals for the Fifth Circuit as set forth in *Texports Stevedore Co. v. Winchester*, 554 F.2d 245, 6 BRBS 265, *aff'd on reh'g en banc*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), Judge Kichuk applied the law established by the United States Court of Appeals for the Ninth Circuit in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).[4] As the court could not discern the facts relevant to whether claimant's injury occurred in an "adjoining area," it remanded the case for further proceedings. *Stratton*, slip op. at 6-9.

On remand, the case was assigned to Administrative Law Judge David W. Di Nardi. Judge Di Nardi (the administrative law judge) held that claimant met the status requirement of Section 2(3), 33 U.S.C. §902(3). Decision and Order at 12-13. After a lengthy discussion of the Section 3(a) situs requirement, Judge Di Nardi found that employer's facility sits approximately two miles away by city streets, and one-half mile away by canoe along the canal, from the Jacksonville Port area.

[4]Decisions of the Fifth Circuit issued prior to close of business on September 30, 1981, are binding precedent in the Eleventh Circuit, wherein this case arises, unless specifically overruled by the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

Noting that the area surrounding employer's facility houses a mixture of maritime and non-maritime businesses and residences, he concluded that, based on the *Winchester* and *Herron* factors, the situs requirement has been met. Decision and Order at 22-23. Moreover, he determined that claimant's January 4, 1991, injury occurred on an area which sits 50 feet from a now-unused, but still navigable, canal, as the canal retained its navigability in law under *Economy Light Co. v. United States*, 256 U.S. 113 (1921). Decision and Order at 23. Judge Di Nardi also found that claimant cannot return to his usual work, that claimant's condition reached maximum medical improvement on May 11, 1991, and that employer has not established the availability of suitable alternate employment because employer's conversation with claimant regarding a job at its facility was casual and was not an actual job offer. Decision and Order at 24-25, 27, 29-30. Consequently, the administrative law judge awarded claimant permanent total disability benefits, in addition to medical benefits and interest, *id.* at 30, 32-33, and he summarily denied employer's motion for reconsideration. Employer appeals, and claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also responds, arguing that the area in which claimant was injured is a covered situs.

Situs

Employer contends the administrative law judge erred in finding that claimant's January 1991 injury occurred on a covered situs. It argues that the administrative law judge did not use the proper standard for determining situs, *i.e.*, he did not apply *Winchester* as directed by the Eleventh Circuit. Specifically, employer asserts there is not a maritime nexus between its facility and the closest body of navigable water. Claimant responds, stressing that employer's facility is within the vicinity of the navigable St. John's River,[5] that the area between the facility and the river is primarily marshland, and that the shop is used for maritime repairs. The Director agrees that claimant's injury occurred on a covered situs.[6] In

[5]Estimates of the distance between employer's facility and the St. John's River varied: 200 to 400 feet, 300 to 400 yards, and one-half to three-quarters mile. Tr.1 at 30, 45; Tr.2 at 84-85. The administrative law judge appears to have found that employer's facility sits 300 to 400 feet from the dock of a neighboring property which extends over the navigable waters of the St. John's River. Decision and Order at 22.

[6]The Director notes that Judge Di Nardi erred in failing to apply the Section 20(a) presumption to the issue of coverage but that the error is harmless, as he nonetheless found coverage exists. The Board has held that the Section 20(a)

reply, employer argues that claimant, the administrative law judge and the *Winchester* court improperly blurred the distinction between status and situs: thus, it asserts claimant was not injured near navigable waters, as he was injured at an inland shop, and *Winchester* does not apply.[7]

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and is not specifically excluded by a provision in the Act.

---

presumption is not applicable to the legal interpretation of the coverage provisions of the Act, which is the issue in question here. *See Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, No. 94-70660 (9th Cir. May 30, 1996).

[7]Employer makes the argument that the administrative law judge failed to apply *Winchester* to this case and at the same time makes the contradictory argument that *Winchester* does not apply because the facility in question was not as close to navigable waters as is feasible. Although the Fifth Circuit took this "close as feasible" factor into consideration in deciding *Winchester*, it did not limit the applicability of that case to those situations. *Winchester* is the seminal case on Section 3(a) situs in the Fifth Circuit and controls determinations regarding whether a site is an "adjoining area." It remains controlling precedent in the Eleventh Circuit as well.

33 U.S.C. §§902(3), 3(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Keating v. City of Titusville*, 31 BRBS 187 (1997). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.* There is no dispute with the administrative law judge's determination that status has been met in this case. The only coverage issue is whether the injury occurred on a covered situs.

Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 197 (1992). To be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an "adjoining area customarily used by an employer in loading, unloading, repairing dismantling or building a vessel." 33 U.S.C. §903(a).[8] An "adjoining area" therefore must have a maritime use, but it need not be used exclusively or primarily for maritime purposes. *Winchester*, 632 F.2d 504, 12 BRBS 719; *Melerine*, 26 BRBS 197. Under the controlling law set forth in *Winchester*, the Fifth Circuit took a broad view of "adjoining area," refusing to restrict it by fence lines or other boundaries. *Winchester*, 632 F.2d at 514-515, 12 BRBS at 726-727; *see also Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199 (CRT) (5th Cir. 1998). Specifically, the court stated that an area can be "adjoining" if it is "close to or in the vicinity of navigable waters, or in a neighboring area. . . ." *Winchester*, 632 F.2d at 514, 12 BRBS at 727; *see also Herron*, 568 F.2d 137, 7 BRBS 409.[9] The

---

[8]Section 3(a), 33 U.S.C. §903(a), states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

[9]The Ninth Circuit determined that an "adjoining area" has a functional relationship to, but does not depend on physical contiguity with, navigable waters and stated that four factors should be considered: the suitability of the site for maritime use; the use of adjoining properties; the proximity of the site to the waterway; and whether the site is as close to the waterway as feasible under the

perimeter of an "area" is to be defined by function; thus, it must be "customarily used by an employer in loading, unloading, repairing or building a vessel." *Winchester*, 632 F.2d at 515, 12 BRBS at 727; *see* 33 U.S.C. §903(a). Moreover, an "area" is not limited to the pin-point site of the injury; rather, determination of whether an area is a covered situs requires an examination of both the pin-point area and the surrounding area, and the character of surrounding properties is but one factor to be considered. *Winchester*, 632 F.2d at 513, 12 BRBS at 726; *see Uresti v. Port Container Industries, Inc.*, 34 BRBS 127 (2000) (Brown, J., dissenting), *aff'g on recon.* 33 BRBS 215 (2000) (Brown, J., dissenting); *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999). Using these guidelines, the Fifth Circuit held in *Winchester* that an administrative law judge properly found that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a nexus to maritime activity in that it was used to store gear which was used in loading process. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729. Within this framework, the Board must determine whether Judge Di Nardi properly determined that claimant's injury on employer's facility occurred on a covered situs.

---

circumstances. *Herron*, 568 F.2d 137, 7 BRBS 409. Although *Herron* and *Winchester* are often cited together, the *Winchester* test, which is applicable here, is less structured than the *Herron* test.

As neither the "clean shed" nor employer's repair facility is a site specifically enumerated in Section 3(a), in order for claimant's injury to be covered, employer's facility must constitute an other "adjoining area." 33 U.S.C. §903(a). Under *Winchester*, an area is an "adjoining area" which is covered if it is "close to or in the vicinity of navigable waters" and is customarily used for maritime purposes. Thus, the geographic location and the function of the area are controlling. In this case, there is no dispute that part of employer's business is to repair pumps, valves, gauges and other devices used on vessels. Work is performed either on the device on the vessel or on the device after it is brought to the shop. Thus, the maritime function criterion is met. *Winchester*, 632 F.2d at 515, 12 BRBS at 727. The facility also meets the liberal geographical criterion developed by the Fifth Circuit, as the administrative law judge found the shop sits between 300 and 400 feet from the navigable St. John's River. Although employer asserts there are non-maritime businesses and residences in the surrounding area, the Fifth Circuit has stated this fact does not conclusively establish that a site is not an "adjoining area." *Winchester*, 632 F.2d at 513, 12 BRBS at 726. A review of the photographs admitted into evidence, Emp. Ex. 1, reveals that, although several sides of employer's facility are surrounded by land and by maritime and non-maritime properties, the facility is near the St. John's River and adjacent to a canal which directly leads to its navigable waters.[10] As the record establishes that employer's facility is "within the vicinity" of the St. John's River, a navigable body of water, and as employer's facility is used to repair and fabricate instruments used to operate vessels, substantial evidence supports Judge Di Nardi's finding that the *Winchester* situs test has been satisfied. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729; *see also Uresti*, 33 BRBS 215; *Gavranovic*, 33 BRBS 1; *Dixon v. John J. McMullen & Associates, Inc.*, 13 BRBS 707 (1981), *aff'd after remand*, 19 BRBS 243 (1986); *Gentile v. Golten Marine Co.*, 13 BRBS 65 (1981); *Short v. Sea Train Shipbuilding Corp.*, 9 BRBS 166 (1978); *Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676 (1978). Therefore, we affirm the administrative law judge's finding that claimant's injury occurred on a covered situs.[11]

Extent of Disability

[10]In fact, the photographs of the facility here depict a site in a locale similar to the aerial view of the location of the gear locker in *Winchester*, 632 F.2d at 517, App. 1, 12 BRBS at 729, App 1.

[11]In light of our conclusion, we need not address whether the administrative law judge properly assessed the navigability of the canal abutting employer's property.

Employer also contends the administrative law judge erred in awarding claimant permanent total disability benefits. It argues it offered claimant a light duty job in its facility, which was approved by claimant's physician, and that this job satisfied its burden of showing the availability of suitable alternate employment. It also asserts that claimant's doctor released him to return to work, but while claimant was involved in the process of creating the specific job, he did not cooperate once the job was formed. Claimant disputes whether an offer was actually made and whether any offer employer may have made was sufficiently specific to satisfy its burden of proof. In reply, employer asserts that claimant was found medically able to work by his doctor and that any failure to communicate the specific details of the job to claimant was due to claimant's refusal to listen.

The administrative law judge found that claimant is unable to return to his usual work. Decision and Order at 25. There is no disagreement on this matter, and it is supported by Dr. Tandron's opinion. Cl. Ex. 1 at 8-9, 21-22. Thus, claimant has established a *prima facie* case of total disability.[12] *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987). Once a claimant establishes his inability to return to his usual work, as here, the burden shifts to his employer to demonstrate the availability of suitable alternate employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether the job is realistically available and suitable for the claimant. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). Merely alleging such work is available will not suffice. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). A job in the employer's facility within the claimant's restrictions may meet this burden provided it is necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). However, the offer of a job which is too physically demanding for the employee to perform or which entails unnecessary work does not constitute suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Ezell*, 33 BRBS at 25.

Following claimant's second injury, Dr. Tandron addressed claimant's physical capabilities. He prohibited claimant from lifting over 15 pounds, sitting or standing longer than 30 minutes at one time, bending, climbing ladders, or routinely

[12]The permanency of claimant's disability is not in dispute.

climbing stairs, and he assessed a 20 percent permanent impairment. Cl. Ex. 1 at 21-23. Dr. Tandron recommended that claimant enroll in a work-hardening program, and he restricted claimant to light to sedentary work.[13] *Id.* at 25-26, exh. at 43. In February 1991, employer presented Dr. Tandron with a description of a supervisor/mechanic position at its facility as alternate work for claimant. The position involved being the on-site supervisor to the other mechanics, performing quality control and repairing and supervising the repair of marine instruments in the shop. It also involved performing work on vessels. Dr. Tandron did not approve this job. Cl. Ex. 3; Emp. Ex. 7. Employer amended the position in April 1991 to allow claimant to perform repairs only in the shop, and to use a stool, obtain assistance, or be accommodated as necessary. With these changes, Dr. Tandron gave his approval. *Id.*; Cl. Ex. 1 at 21.

At the first hearing, Mr. Weedon, employer's president, testified that he and the company wanted to retain claimant's skills and experience, so he offered to place claimant in a supervisory capacity. Tr.1 at 46-47. He reiterated this at the second hearing. Tr.2 at 112, 114. According to Mr. Weedon, at some point he and claimant spoke briefly on the matter, and he offered a position to claimant, in vague terms, saying claimant would perform small repairs in the shop and do some office work related to placing orders for feed pump parts. Claimant declined, indicating he could not stand very long, and Mr. Weedon testified he told claimant appropriate accommodations could be made. Mr. Weedon further stated he was unable to discuss salary with claimant because claimant refused the position; however, Mr. Weedon testified the job would have paid claimant's pre-injury salary. Tr.2 at 113-116.

While claimant stated he never received a formal written offer for the position, at some time he became aware of the job duties because he testified he formed the opinion that he could not perform the job. Tr.2 at 46, 49, 69, 81. He also noted that the position did not exist prior to his injury. *Id.* at 81-82. After reading the job description and Dr. Tandron's approval thereof, claimant testified he believed it involved too much standing and lifting. *Id.* at 45, 68. A former co-worker, Mr. Lore, testified that a mechanic supervisor position would involve 50 percent supervising and 50 percent repair work, and the items needing to be lifted typically weighed between 50 and 150 pounds; however, for heavy items, there was usually someone to assist. Tr.2 at 90, 93-94.

[13]Dr. Silvera, a physiatrist, also reported that claimant was not totally disabled and could perform a sedentary job. Cl. Ex. 2 at 4, 16, 23.

Because employer's proof of suitable alternate employment is based solely on the job it offered in its facility, *see Darby*, 99 F.3d at 685, 30 BRBS at 93(CRT); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986), it was necessary for the administrative law judge to ascertain whether a specific job was offered to claimant and then to determine whether claimant could perform the duties thereof. *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986). In this case, the administrative law judge credited employer's assertion that there was a discussion with claimant about post-injury work; however, he found that employer did not satisfy its burden because the conversation between claimant and employer was "casual," in very general terms, and no job was offered to claimant at that time. Decision and Order at 30. With regard to the suitability of the position, the administrative law judge stated only that testimony from claimant and Mr. Lore that everyone performs heavy work "seriously call[s] into question whether the Claimant could even perform the job." *Id.* Thus, he found that employer failed to establish the availability of suitable alternate employment and that claimant is totally disabled.

Our review of the decision and the evidence reveals that the administrative law judge did not address all evidence relevant to the question of whether employer offered claimant a specific job. The evidence demonstrates the efforts of a rehabilitation specialist, a case manager and a physical therapist to create a position within claimant's physical limitations. Emp. Ex. 7; M/Recon. exh. A. It also appears that claimant was aware of and possibly involved in this process.[14] Emp. Ex. 5. Additionally, the written job description in the record listed the duties, the physical and vocational requirements, and the environmental conditions of the position. Emp. Ex. 7. Dr. Tandron approved this position. Cl. Exs. 1 at 21, 3; Emp. Ex. 7. There is also a February 2, 1993, letter from employer's counsel to claimant's counsel which stated, as of that date, the offer of employment was still available to claimant. M/Recon. exh. A. Additionally, there is testimony from Mr. Weedon at the 1999 hearing that claimant would have been paid his pre-injury salary. Tr.2 at 116. The administrative law judge did not discuss any of this evidence in deciding whether the job offer was authentic. Rather, he based his decision solely on the one-time discussion between claimant and Mr. Weedon. As he found, the face-to-face discussion did not convey sufficient information to claimant to satisfy employer's

[14]In the April 16, 1991, entry of his notes, Emp. Ex. 5, Dr. Tandron wrote:

> Mr. Stratton returns today. He is miserable with his back at this point. I have got a job description that his rehab specialist brought with him and I met with both of them. * * * Donald doesn't feel like he can perform his job. I think the job is reasonable for someone with a back problem, but I would like to repeat the MRI of his lumbo-sacral spine. Depending on what that shows, he can or cannot return to work.

burden of offering a specific job to claimant.[15] *See Letendre v. Braswell Shipyards, Inc.*, 11 BRBS 56 (1979). Nonetheless, due to the administrative law judge's failure to discuss the other evidence relevant to this issue, we must vacate his decision and remand the case for further consideration of the availability of suitable alternate employment.

In ascertaining the suitability of a job, moreover, the administrative law judge must compare the duties of the position with the claimant's restrictions. *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). The administrative law judge here did not make this comparison, although the record contains sufficient evidence to do so. Therefore, upon remand, if he finds a specific job was offered to claimant, the administrative law judge must make findings regarding the job duties and compare these duties with the credited medical restrictions to determine whether the position in question was suitable for claimant. In addition, if he finds a suitable job was available, he must determine when it became available. *See, e.g., Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Accordingly, the case is remanded for reconsideration of the extent of disability in accordance with this opinion.

[15]The administrative law judge questioned whether this job may have been "make work" for claimant. However, provided a job is necessary, it can be considered suitable alternate employment even if it is tailored to a claimant's specific needs. *Ezell*, 33 BRBS at 25; *Buckland v. Dep't of Army/NAF/CPO*, 32 BRBS 99 (1997); *Larsen*, 19 BRBS 54.

Attorney's Fee

Claimant's counsel filed a petition for an attorney's fee for work performed between October 22, 1992, and October 20, 1994, for a total fee of $17,769.72[16] and between September 14, 1998, through February 14, 2000, for a total fee of $28,477.[17] Employer objected to the hourly rates, the time requested for services in the unsuccessful efforts before Judge Kichuk, and specific entries as being excessive or inappropriate.

On March 9, 2000, the administrative law judge issued a supplemental decision awarding an attorney's fee. Although he acknowledged employer's objections, he did not specifically address them and he declined to reduce the fee, awarding the entire amount requested, $46,246.72. In an Order dated March 22, 2000, the administrative law judge denied, as untimely filed, employer's objections to the fee request. Employer appeals both decisions, and claimant responds, urging affirmance.

Initially, employer seeks reversal of the administrative law judge's March 22 Order denying the objections as untimely filed. In response, claimant concedes confusion regarding documents to which the administrative law judge might be referring. In the Decision and Order, Judge Di Nardi granted claimant 30 days in which to file a request and employer 14 days in which to respond. Decision and Order at 41. In the Supplemental Decision awarding the fee, he stated that

[16]This represents 81.6 hours at a rate of $200 per hour, plus 4.8 hours at a rate of $150 per hour, plus $729.72 in expenses.

[17]This represents 112.5 hours at a rate of $250 per hour plus $352 in expenses.

claimant's petition was received on February 22, 2000. As it is clear from that same order that the administrative law judge received, acknowledged and identified generally employer's objections, his statement in the March 22, 2000, order that the objections were not received until March 21, 2000, twelve days after the fee was awarded, is erroneous.[18] Accordingly, we vacate the administrative law judge's March 22, 2000, Order Denying Objection to Attorney Fee Petition as Untimely Filed.

[18]An attachment to the appeal brief, Er's Fee Brief at exh. 1, reveals that employer's objections were delivered to the administrative law judge's office by Federal Express on March 3, 2000, in compliance with the Decision and Order.

Next, employer challenges a number of entries in the fee award as being inappropriate as they are for services rendered while this case was before the court of appeals. Our review reveals that Judge Di Nardi erred in approving a fee for services rendered before the district director, the Board, and the Eleventh Circuit. This case was referred to the OALJ on February 24, 1993; the administrative law judge cannot award a fee for services performed prior to that date. *Fitzgerald v. RCA International Service Corp.*, 15 BRBS 345 (1983). Thereafter, the case was appealed to the Board on August 31, 1994,[19] and it was administratively affirmed on September 12, 1996. The case was then before the Eleventh Circuit until December 16, 1998, when it was remanded to the Board. The Board issued its remand order on January 22, 1999. Therefore, except for the time necessary to resolve a motion for reconsideration before Judge Kichuk, Judge Di Nardi inappropriately awarded a fee for services performed while this case was before the district director, the Board and the court. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). Although employer objected only to the portion of the fee for services rendered while the case was before the Eleventh Circuit, Judge Di Nardi's fee award for services before the district director and the Board also cannot stand. Consequently, we hereby exclude the fee for all services not rendered before the OALJ. This results in a reduction of the fee award by a total of $4,895.[20]

With regard to the remainder of the fee award, employer asserts, as it did in its objections before the administrative law judge, that the hourly rates are excessive, that claimant was not fully successful at the administrative law judge level, and that certain entries are objectionable. Employer has not shown that the awarded hourly rates are unreasonable or excessive. *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). Therefore, we reject employer's argument. We also reject its argument that as claimant was not successful while his claim was before Judge Kichuk, he is not entitled to a fee for those services. Ultimate success

[19]Claimant also filed a motion for reconsideration which was denied by Judge Kichuk on October 26, 1994.

[20]This represents 4.8 hours at $150 per hour, 13 hours at $200 per hour, and 6.3 hours at $250 per hour.

by a claimant renders an employer liable for all work performed leading to that success. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *see generally Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990); *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994) (decision on remand). Because we have partially vacated the decision on the merits and remanded the case for further consideration of claimant's entitlement to benefits, however, we cannot yet ascertain claimant's degree of success. Therefore, we must also vacate the fee award and remand it for further consideration. If claimant is ultimately successful in pursuing his claim on remand, then the earlier failure before Judge Kichuk does not preclude claimant's counsel from obtaining a fee for those services. *Hole*, 640 F.2d 769, 13 BRBS 237.

Finally, employer lists specific objections to certain entries in the fee petition. A number of the objections have been resolved by our prior conclusions. Others pertain to allegedly excessive time billed for reading or writing one-page letters, to differing charges for the same type of work, to charging 2.5 hours for performing allegedly clerical work, and to reading and reviewing an unidentifiable order. These remaining objections account for 6.1 hours of the requested time for a total of $1,355.[21] On remand, the administrative law judge must also address these objections in awarding any fee to claimant's counsel.

Accordingly, the administrative law judge's finding that claimant's injury occurred on a covered situs is affirmed. The award of permanent total disability benefits, however, is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The fee award is modified to reflect the exclusion of $4,895 for work which was not performed before the OALJ. The fee award is also vacated, and the

[21]This represents 3.4 hours at $200 per hour and 2.7 hours at $250 per hour.

case is remanded to the administrative law judge for further consideration in accordance with this opinion. The March 22, 2000, Order Denying Objection to Attorney Fee Petition as Untimely Filed is vacated in its entirety.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge